

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

10 UNITED STATES OF AMERICA,
11 Plaintiff,
12 v.
13 JORGE L. MACHADO,
14 Defendant.

Case No. 2:11-cr-00322-LDG (CWH)

ORDER

18 The defendant, Jorge L. Machado, moves to vacate, set aside or correct his criminal
19 convictions and sentence pursuant to 28 U.S.C. §2255 (ECF Nos. 40, 41). He argues that
20 his conviction for use of a firearm during and in relation to a crime of violence must be
21 vacated because federal armed bank robbery no longer qualifies as a "crime of violence."
22 The United States opposes the motion (ECF No. 45) and has moved for leave (ECF No.
23 48) to advise the Court of the Ninth Circuit's recent published decision, *United States v.*
24 *Watson*, 881 F.3d 782 (9th Cir. 2018), that rejects each of Machado's arguments and holds
25 that federal armed bank robbery remains a crime of violence. Machado has responded to
26 the submission of the recent authority (ECF No. 49).

1 In *Watson*, the Ninth Circuit addressed and rejected the arguments fundamental to
2 Machado's motion, applying the categorical approach in making those determinations.
3 *Watson*, 876 F.3d at 784. Machado argues that "federal bank robbery, as defined by
4 §2113(a), does not meet the violent physical force requirement because it can be
5 accomplished by 'intimidation' that does not require the use, attempted use, or threatened
6 use of 'violent force.'" Defendant's Brief, p.14, ll. 17-19. The Ninth Circuit rejected this
7 argument, holding "that 'intimidation' as used in § 2113(a) requires that the defendant take
8 property 'in such a way that would put an ordinary, reasonable person in fear of bodily
9 harm' and that a 'defendant cannot put a reasonable person in fear of bodily harm without
10 threatening to use force capable of causing physical pain or injury.'" *Watson*, 881 F.3d at
11 785 (quoting *United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017)).

12 Machado further argues that "intimidation" as contained in 18 U.S.C. § 2113(a) does
13 not constitute a crime of violence under the physical force clause because it does not
14 require an intentional threat of physical force." Defendant's Brief, p. 15, ll. 9-11. The Ninth
15 Circuit rejected this argument, holding that "[t]he offense must at least involve the knowing
16 use of intimidation, which necessarily entails the knowing use, attempted use, or
17 threatened use of violent physical force." *Watson*, 881 F.3d at 785.

18 Finally, Machado argues that the more serious offense of armed federal bank
19 robbery also fails to qualify as a crime of violence, as 18 U.S.C. §2113(d) is insufficient to
20 convert a bank robbery into a crime of violence. As noted by the Ninth Circuit, however,
21 [b]ecause bank robbery 'by force and violence, or by intimidation' is a crime of violence, so
22 too is armed bank robbery." *Id.*, at 786.

23 In addressing the impact of *Watson*, Machado asks that the Court grant him a
24 Certificate of Appealability so that he may preserve these issues. The Court will deny the
25 request. *Watson* is binding precedent on this Court, and directly rejects each of Machado's
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1 arguments. Further, as the Ninth Circuit noted in *Watson*, "in so holding, [it] joined every
2 other circuit to address the same question." *Id.*, at 785.

3 Accordingly,

4 THE COURT ORDERS that the United States' Motion for Leave to Advise the Court
5 of New Authority (ECF No. 48) is GRANTED;

6 THE COURT FURTHER ORDERS that Defendant's Abridged Motion (ECF No. 40)
7 and Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. §2255 (ECF No.
8 41) are DENIED.

9 THE COURT DECLINES to issue a Certificate of Appealability.

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11 DATED this 28 day of February, 2018.


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13 Lloyd D. George
14 United States District Judge
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